



**BILLING CODE 3510-03**

**DEPARTMENT OF COMMERCE**

**48 CFR Parts 1328 and 1352**

**[Document Number: 150129094-5094-01]**

**RIN: 0605-AA37**

Commerce Acquisition Regulation (CAR); Waiver of Bond Requirement for Contracts to Repair, Alter or Construct Certain Research and Survey Vessels for the National Oceanic and Atmospheric Administration

**AGENCY:** Department of Commerce (Commerce).

**ACTION:** Interim final rule.

**SUMMARY:** We, the Department of Commerce (Commerce), issue an interim final rule to provide procedures for waiving performance and payment bonds required under U.S. law, associated with contracts for the repair, alteration and construction of the National Atmospheric and Oceanographic Administration's (NOAA) fleet of research and survey vessels operated by the Office of Marine and Aviation Operations (OMAO). The regulations implement the authority provided to the Secretary of Commerce in Section 111 of the "Department of Commerce Appropriations Act, 2015," and comport with language in the Appropriation Committee's report instructing NOAA to promulgate regulations prior to implementing the waiver authority. This final rule amends the CAR by inserting a section and amending a part to add the contract language for the waivers.

**DATES:** This action is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. However, Commerce will accept comments on this interim final rule until [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** The final rule is available at [www.regulations.gov](http://www.regulations.gov), or by contacting the Department of Commerce: Room 1854, 1401 Constitution Avenue, N.W., Washington, DC, 20230.

You may submit comments on this interim final rule on [regulations.gov](http://www.regulations.gov), search for RIN 0605-AA37, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. The Department of Commerce will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Virna Winters, 202-482-3483.

**SUPPLEMENTARY INFORMATION:**

Background

Section 111 of the “Department of Commerce Appropriations Act, 2015,” Division B, Title I of Pub. L. 113-235 (Dec. 16, 2014) (Appropriations Act) granted the Secretary of Commerce the authority to waive the performance and payment bond requirement under 40 U.S.C. 3131 et seq., for the construction, alteration, or repair of ships in NOAA’s fleet of vessels. 40 U.S.C. 3131 et seq. requires prime contractors to furnish performance and payment bonds for contracts in excess of \$150,000, for the construction, alteration, or repair of any public building or public work of the Federal government including ship construction, alteration, and repairs. NOAA’s Office of Marine and Aviation Operations (OMAO) operates a fleet of hydrographic survey, oceanographic research and fisheries survey vessels, consistent with its mission to perform offshore and deep-sea survey operations, coastal mapping, oceanographic research, and other functions that ensures public safety and the preservation of the Nation’s property and natural resources. The waiver authority will align the Commerce’s authorities with those of other Federal agencies, including the U.S. Department of the Navy and the U.S. Coast Guard, and is expected to address significant difficulties NOAA has experienced in obtaining competitive bids for ship repairs. The authorization for this waiver lasts as long as it is included in appropriations measures, or authorizing legislation, enacted by Congress

Commerce publishes this action to amend the CAR to provide guidance for implementing the authority granted to the Secretary of Commerce in the Appropriations Act. The following is a summary of the procedures which will be in the amendment to the CAR.

NOAA ships enter into either a dry docking or dockside repair period every fiscal year, typically in the first or second quarter of the fiscal year. Each vessel is equipped with highly advanced survey instruments, state of the art electronics, computers, and navigational and communications systems, which must be kept operational to ensure the safety of the crew and the

ship's schedule. It also is often necessary for emergency repairs to be made to NOAA's vessels without delay for safety purposes and to ensure that the ships can carry on their missions involving the collection of mission sensitive data, as well as immediate response capabilities for extreme weather-related events involving hurricanes. As noted above, prime contractors performing those maintenance activities on NOAA's vessels have been required to provide performance and payment bonds for that work. These bonding requirements have placed an undue burden on smaller shipyards that have limited financial resources and have hindered their ability to bid on NOAA's requirements. This has resulted in inadequate competition for repairs to the Atlantic and Pacific fleets, delays to ship schedules, inferior quality and increased costs to the Government.

The Appropriations Act gives the Secretary of Commerce the authority to waive the bonding requirement for the alteration, repair and construction of NOAA's vessels to encourage contractors, especially small shipyards, to bid on NOAA's vessel projects. In order to implement the authority in an efficient manner and consistent with the congressional mandate, this action allows NOAA to waive bond requirements for ship construction, alteration and repairs.

Contracting Officers (CO) may not issue solicitations waiving the requirements for bonds until the waiver request is approved. The CO will retain the discretion to require bonds if the complexity of the work and the level of competition in the region warrant them. All solicitations for ship construction, alteration, or repairs where bonds are not required will include a provision informing potential offerors that the failure to pay subcontractors could adversely affect their past performance and have an impact on their eligibility for award of future contracts. Contractors will provide written confirmation that all subcontractors have been properly paid prior to submission of final invoice.

## Classification

Executive Orders 12866 and 13563: This interim final rule has been drafted according to the requirements of Executive Orders 12866 and 13563, and has been determined to be “not significant” under those orders.

The Department of Commerce finds good cause under 5 U.S.C. 553(b)(3) and (d) to waive the notice and comment and 30-day delay in effectiveness periods for this action. Congress granted the Secretary of Commerce the authority to waive the bonding requirements involved in this action in the Appropriations Act. That authority lasts the duration of fiscal year 2015 and carries through any years in which Congress reauthorizes the authority. Because the waiver authority may be of limited duration, it is impracticable and contrary to the public’s interest to submit this rule to the ordinary notice and comment timeframe. Doing so would restrict the time limit for the authority, contrary to Congressional intent, and thereby reduce or eliminate the benefits to the public and to the Government of waiving the bonding requirements. Use of the waiver will benefit the public by allowing greater competition for shipbuilding and ship repair activities, and helps NOAA’s vessels maintain working operation for more days out of the year. Because allowing public comment and delaying the effectiveness of this rule for 30 days is impracticable and contrary to the public’s interest, Commerce hereby waives those requirements.

Although this interim rule will become effective upon publication in the Federal Register, Commerce is nonetheless seeking public comments on this rule and plans on publishing a final rule in the future that takes into account and responds to public comments.

Regulatory Flexibility Act: Because notice and comment under 5 U.S.C. 553 are not required for this rule, the requirements of the Regulatory Flexibility Act do not apply. 5 U.S.C. 603. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

Paperwork Reduction Act (PRA): This rule does not impose any new information collections subject to review and approval by the Office of Management and Budget (OMB) under the PRA. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

## **List of Subjects**

### 48 CFR Part 1328

Government procurement, Insurance, Reporting and recordkeeping requirements, Surety bonds.

### 48 CFR Part 1352

Government procurement, Matrix, Reporting and recordkeeping requirements.

Ellen Herbst,  
Chief Financial Officer and Assistant Secretary of Administration,  
U.S. Department of Commerce.

For the reasons set out in the preamble, the Department of Commerce amends 48 CFR parts 1328 and 1352 as follows:

## **PART 1328 – BONDS AND INSURANCE**

1. The authority citation for part 1328 continues to read as follows:

Authority: 41 U.S.C. 414; 48 CFR 1.301-1.304.

2. Add sections 1328.102, 1328.102-1, 1328.102-2, and 1328.102-3 to subpart 1328.1 to read as follows:

### **1328.102 Waiver of performance and payment bonds for contracts involving the construction, alteration, and repair of NOAA's fleet of vessels.**

#### **1328.102-1 Waiver policy.**

(a) Pursuant to the authority vested in the Secretary of Commerce, the requirements of 40 U.S.C. 3131 through 3133 may be waived by virtue of the authority vested in him or her pursuant to the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, Div. B, Title I, Sec. 111 (2014), with respect to contracts for the repair, alteration, and construction of NOAA's hydrographic survey, oceanographic research, and fisheries survey vessels operated by NOAA Office of Marine and Aviation Operations in the Atlantic and Pacific regions including the Pacific Islands. The Department's policy and procedures for use of the waiver authority is set forth in CAM 1328.102.

(b) Contracting officers are required to consider any unusual circumstances that may arise in which either payment or performance bonds, or both, will be advantageous to the Government in connection with these contracts prior to issuing solicitations.

#### **1328.102-2 Waiver authority.**

The designee authorized to approve bond waivers is set forth in CAM 1328.102.

#### **1328.102-3 Contract clause.**

The contracting officer shall insert the clause at 1352.228-77, Contractor Assurance of Subcontractor Payments, in solicitations and contracts when performance and payment bonds are waived.

## **PART 1352 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

3. The authority for part 1352 continues to read as follows:

Authority: 41 U.S.C. 414; 48 CFR 1.301–1.304.

4. Add section 1352.228-77 to subpart 1352.2 to read as follows:

### **1352.228-77 – Contractor assurance of subcontractor payments.**

As prescribed in 48 CFR 1328.102-3, insert the following clause:

Contractor Assurance of Subcontractor Payments ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

(a) To protect the interests of subcontractors participating in the performance of this contract, the Government requires the assurance that all monies due to subcontractors is timely and properly made prior to the submission of the contractor's final invoice.

(b) By accepting this award, in writing or by performance, the offeror/contractor represents that—it will provide full payment to all subcontractors utilized in the performance of the resultant contract prior to the submission of its final invoice.

(c) No later than five (5) days after contract award the contractor shall provide the Contracting Officer with a list of all subcontractors to be utilized in the performance of this contract. The contractor must provide updates to the Contracting Officer throughout the contract, should changes be made.

(d) The following shall be completed and provided accordingly:

SUBCONTRACTOR LIST – CONTRACT NO. _____
---



Name of Subcontractor Business	Subcontractor Point of Contact with contact information (number/e-mail)	Contract Line Item(s) to which subcontract work is tied	Applicable Trade (electrical, mechanical, etc.)

(e) Reports by subcontractors of delayed or non-payment during the performance of the contract may impact the Government's continued payment of contractor invoices on a percentage of completion basis. (CAR clause, 1352.271-71, Method of Payment and Invoicing Instructions for Ship Repair).

(f) The contractor shall include the following statement on its final invoice --

“By submission of this invoice, assurance is herein provided that all monies due to any and all subcontractors used in the performance of this contract have been paid in full prior to the submission of this final invoice.”

(g) Failure to pay subcontractors could adversely affect the contractor's past performance evaluation for this contract and have a negative impact on its eligibility for future contract awards.

(h) The Government may seek any available remedies in the event the contractor fails to comply with the provisions of this clause.

[FR Doc. 2015-10620 Filed: 5/12/2015 08:45 am; Publication Date: 5/13/2015]